Garcia v Allstate Indem. Co.
2025 NY Slip Op 31985(U)
May 22, 2025
Supreme Court, Kings County
Docket Number: Index No. 506059/2023
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 22nd day of May, 2025.

PRESENT:
HON. CAROLYN E. WADE,
Justice

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DONACIANO GARCIA,
Plaintiff,

-against-

ALLSTATE INDEMNITY COMPANY,

Defendant.

---X

Index No. 506059/2023

DECISION AND ORDER

Mot. Seq. No. 1

Recitation, as required by CPLR 2219 (a), of the electronic papers considered in the review of the post-answer motion of defendant Allstate Indemnity Company to dismiss the complaint:

Notice of Motion, Affirmation, and Exhibits Annexed.................................	**10-19**
Opposing Affirmation, Memorandum of Law, and Exhibits Annexed........	**33-34**
Reply Affirmation, Memorandum of Law and Exhibits Annexed...............	**37-43**
Proposed Orders with Supporting Affirmations...	**49-52**
Long-Form Order, dated January 30, 2025..	**53**
Parties' Post-Long Form Order Briefings...	**58-59**

Upon the foregoing papers and after oral argument, the post-Answer Motion of Defendant Allstate Indemnity Company ("Defendant") for an Order, pursuant to CPLR 3211 (a) (5), dismissing the Complaint of Plaintiff Donaciano Garcia ("Plaintiff"), dated February 24, 2023 (the "Complaint"), is decided as follows:

Background

On August 10, 2017 ("the loss"), a fire damaged the windows and private balcony in Plaintiff's unit. Plaintiff's unit was in a condominium building located at 22 North Sixth Street in the Williamsburg section of Brooklyn, New York (the "building" or "condo"). At the time

of loss, Plaintiff's unit was covered by an insurance policy issued by Defendant to Plaintiff.[1] On the day of loss, Plaintiff reported it to Defendant.[2] Approximately two weeks later on August 25, 2017, Defendant performed an on-site examination of Plaintiff's unit.[3] By letter, dated September 26, 2017, Defendant denied coverage for the portion of the loss that related to the balcony in Plaintiff's unit.[4] On the same day, when Plaintiff telephoned Defendant to "follow up on the status of [his claim]. [Defendant's] adjuster reiterated [to him] that the building should perform . . . the repairs[,] and [that the adjuster] would continue to follow up with the [condo's] property manager"[5] for the "documents showing the definition of the word 'Unit' as used in the Bylaws to confirm coverage,"[6] which word was defined in "the building's Declaration of Condominium" (the "condo declaration").[7]

Five years passed from September 2017 until October 2022, with no one forwarding a copy of the condo declaration to Defendant in the interim. Meanwhile, the building was "arrang[ing] for the contractors to perform the repairs [in Plaintiff's unit], and the repairs were completed in or around June 2022. Sometime [there]after, the building forwarded the repair bills to [Plaintiff]. The cost of the repairs totaled more than $80,000.00. In or around October 2022, the repair bills were forwarded to [Defendant] to pay."[8]

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[1] Complaint, ¶¶ 11-12.
[2] Complaint, ¶ 15; Plaintiff's Affidavit, dated February 27, 2024 (NYSCEF Doc No. 33) ("Plaintiff's Affidavit"), ¶ 6.
[3] Plaintiff's Affidavit, ¶ 13.
[4] Defendant's letter to Plaintiff, dated September 26, 2017 (NYSCEF Doc No. 16).
[5] Plaintiff's Affidavit, ¶ 19.
[6] Plaintiff's Affidavit, ¶ 11.
[7] Plaintiff's Affidavit, ¶ 23.
[8] Plaintiff's Affidavit, ¶¶ 21-22.

Once confronted with the repair bills to Plaintiff's unit, Defendant reiterated its request for a copy of the condo declaration. In October 2022, Plaintiff's counsel "obtain[ed] through public records the [condo declaration]" and "sent [it] to [Defendant]."[9] By letter, dated October 12, 2022, Defendant notified Plaintiff that it was denying coverage for the entirety of the loss on the grounds that the building was exclusively responsible for it.[10] By letter, dated November 7, 2022, Plaintiff's counsel disputed the grounds for Defendant's denial of coverage.[11] By letter, dated November 17, 2022, Defendant reiterated its denial of coverage, citing a particular provision in the condo's By-Laws as the basis for its denial.[12]

On February 24, 2023, Plaintiff commenced this action to recover damages for the loss to his unit. In his Complaint, Plaintiff asserted three causes of action sounding in declaratory relief and breach of contract (collectively, the "policy claim"), as well as in violation of General Business Law § 359 (the "statutory claim").[13] On March 28, 2023, Defendant interposed an Answer to the Complaint (the "Answer"). Therein, Defendant asserted (as relevant herein) that the policy claim was barred by the policy's two-year limitations period, and that the statutory claim failed to state a cause of action.[14] In particular, Defendant asserted in its Answer that § 1 ("Conditions"), ¶ 12 ("Suit Against Us") of the underlying policy

[9] Plaintiff's Affidavit, ¶ 23.
[10] Complaint, ¶ 22.
[11] Complaint, ¶ 23.
[12] Defendant's letter to Plaintiff's counsel, dated November 9, 2022 (NYSCEF Doc No. 17).
[13] Complaint, ¶¶ 29-50 and ¶¶ 51-70 (the policy and statutory claims, respectively).
[14] Answer, ¶¶ 23-25 and ¶ 26 (the third and fourth affirmative defenses, respectively).

required that "[a]ny suit or action must be brought within two years after the inception of loss or damage, " *i.e.*, from the date of loss (the "contractual limitations period").[15]

Plaintiff opposed Defendant's motion primarily by way of his Affidavit.[16] After oral argument held on January 30, 2025, and upon receipt of supplemental briefing, the Court reserved decision on the instant motion.

Discussion

"On a motion pursuant to CPLR 3211 (a) (5) to dismiss a complaint as time-barred, the moving defendant[ ] must establish, prima facie, that the time within which to commence the action has expired" (*Mohrman v. Johns*, 210 AD3d 1075, 1076 [2d Dept 2022]). "In this regard, the defendant must establish, inter alia, when the cause of action accrued" (*Barry v. Cadman Towers, Inc.*, 136 AD3d 951, 952 [2d Dept 2016], *lv denied* 28 NY3d 913 [2017]). "If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*id.*), or whether "the case at hand falls within an exception to the limitations period" (*Snyder v. Allstate Ins. Co.*, 70 AD3d 670, 671 [2d Dept 2010] [internal quotation marks and alterations omitted], *lv dismissed in part, denied in part* 17 NY3d 748 [2011], *rearg denied* 17 NY3d 917 [2011]).

[15] Answer, ¶ 23 (quoting § 1, ¶ 12 at page 18 of the underlying policy at NYSCEF Doc No. 15) (the "underlying policy").

[16] Plaintiff's Affidavit (as referenced above). The complaint, which is not verified by Plaintiff, cannot serve as his affidavit.

CPLR 201 states, in relevant part, that "[a]n action . . . must be commenced within the time specified in this article [of the CPLR] unless . . . a shorter time is prescribed by written agreement." [A]n agreement which modifies the [s]tatute of [l]imitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable . . . [,] provided it is in writing" (*Van Der Velde v. New York Prop. Underwriting Assn.*, 205 AD3d 970, 971 [2d Dept 2022] [internal quotation marks omitted], *lv denied* 39 NY3d 902 [2022]). Further, "there is nothing inherently unreasonable about a two-year period of limitation," which is the contractual limitations period in this case (*Van Der Velde*, 205 AD3d at 971 [internal quotation marks omitted]).[17]

Here, Defendant, by citing the contractual limitations period, satisfied its burden of producing evidence sufficient for dismissal of the policy claim as time-barred (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967-968 [1988]; *Pavoist v. Kensington Ins. Co.*, 228 AD3d 780, 781 [2d Dept 2024]; *Van Der Velde*, 205 AD3d at 971; *Iken-Murphy v. State Farm Ins. Co.*, 195 AD3d 470 [1st Dept 2021]; *Botach Mgt. Group v. Gurash*, 138 AD3d 771, 773 [2d Dept 2016]; *D'Angelo v. Allstate Ins. Co.*, 126 AD3d 931, 931-932 [2d Dept 2015]; *John v. State Farm Mut. Auto. Ins. Co.*, 116 AD3d 1010, 1012 [2d Dept 2014]).

[17] As the Court of Appeals observed 46 years ago:

> "The parties may cut back on the Statute of Limitations by agreeing that any suit must be commenced within a shorter period than is prescribed by law. Such an agreement does not conflict with public policy but, in fact, more effectively secures the end sought to be attained by the statute of limitations. Thus an agreement which modifies the [s]tatute of [l]imitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable."

(*John J. Kassner & Co., Inc. v. City of New York*, 46 NY2d 544, 550-551 [1979] [internal quotation marks and citation omitted]).

In opposition, Plaintiff failed to demonstrate any legitimate basis for estopping Defendant from relying on the contractual limitations period for dismissal of his policy claim. Plaintiff failed to "offer evidence that [Defendant] committed any act, much less that [it] engaged in a course of conduct which lulled [him] into inactivity in the belief that [his] claim would ultimately be processed, or that [he was] induced by fraud, misrepresentation or deception to refrain from commencing a timely action" (*Minichello v. North Assur. Co. of Am.*, 304 AD2d 731, 732 [2d Dept 2003] [internal quotation marks omitted]). Plaintiff was made aware prior to the expiration of the contractual limitations period that Defendant's receipt of the condo declaration was necessary to resolve his claim.[18] Although Plaintiff contends that his delay in commencing this action was due (at least, in part, if not in whole) to one or more of the following events: (1) the completion of the repairs of his unit by the building's contractors in June 2022, (2) the submission of the repair bills to Defendant in October 2022, and (3) his counsel's transmission of the condo declaration to Defendant also in October 2022,[19] none of those events could have caused any delay because each of them occurred after the expiration of the contractual limitations period (*see Botach Mgt. Group*, 138 AD3d at 773-774). A five-year delay (on the part of either Plaintiff, his agents, the condo manager, and/or all of them) to transmit the condo declaration to Defendant is not the latter's fault. Far from being a case of Defendant's "lulling" Plaintiff into a sense of false security,

[18] According to Plaintiff (in ¶ 20 of his Affidavit), "[Defendant] never informed [him] as to whether it obtained the [condo declaration]" until October 2022. The burden, however, was on Plaintiff (or his agents) to provide the condo declaration to Defendant.

[19] Plaintiff's Affidavit, ¶¶ 21-23.

this is a case of "the latter's sleeping on his rights" (*Proc v. Home Ins. Co.*, 17 NY2d 239, 246 [1966], *rearg denied* 18 NY2d 751 [1966]).

Plaintiff's reliance on § 1 ("Conditions"), ¶ 6 ("Our Settlement of Loss") is misplaced. Plaintiff selectively quotes the first and second sentences of ¶ 6,[20] while omitting the third (and crucial) sentence of ¶ 6, as italicized below:

> "We will settle any covered loss with you unless another payee is named in the policy. We will settle within 60 days after the amount of loss is finally determined. *This amount may be determined by an agreement between you and us, an appraisal award, or a court judgment.*"[21]

Plaintiff's statutory claim under General Business Law § 349 is also subject to dismissal, albeit on a different ground.[22] The elements of a claim under this section include consumer-oriented conduct that is materially deceptive and causes injury to a plaintiff (*see Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20, 25 [1995]). "While it is settled that disputes involving insurance transactions can fall within the ambit of General Business Law § 349, private contractual disputes upon matters not affecting the consuming public are not actionable under this section" (*Shou Fong Tam v. Metro. Life Ins. Co.*, 79 AD3d 484, 486 [1st Dept 2010] [internal citations omitted]). This action involves a private contract dispute regarding insurance coverage under the policy at issue, in contrast to the consumer-oriented, deceptive conduct aimed at the public at large that General Business Law § 349 was designed to address (*see Sakandar v. American Tr. Ins. Co.*, 231 AD3d 759,

[20] Plaintiff's Affidavit, ¶ 16; Plaintiff's Memorandum of Law, dated February 28, 2024 (NYSCEF Doc No. 34), unnumbered pages 8-9 (italics added in each instance).

[21] Underlying policy, § 1, ¶ 6 at page 17.

[22] Unlike the policy claim, which is circumscribed by the two-year contractual limitations period, the statutory claim is subject to a three-year limitations period under CPLR 214 (2) (*see Endemann v. Liberty Ins. Corp.*, 2023 WL 4102245, *1, n 2 [2d Cir 2023]).

760 [2d Dept 2024]; *Davin v Plymouth Rock Assur. Co. of NY*, 227 AD3d 862, 864 [2d Dept 2024], *lv denied* 42 NY3d 905 [2024]).

The parties' remaining arguments either are without merit or need not be reached in light of the foregoing determination.[23]

Conclusion

Based on the foregoing and after oral argument, it is hereby:

ORDERED that Defendant's motion is **GRANTED**, and all of Plaintiff's claims, as pleaded in his Complaint are **DISMISSED** without costs or disbursements; and it is further

ORDERED that, as the result of the rulings made herein, the Complaint is **DISMISSED** in its entirety; and it is further

ORDERED that Defendant's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on Plaintiff's counsel and to electronically file an Affidavit of said service with the Kings County Clerk.

This constitutes the Decision and Order of the Court.

KINGS COUNTY CLERK
FILED
2025 MAY 30 A 12:28

E N T E R,

HON. CAROLYN E. WADE
SUPREME COURT JUSTICE
Hon. Carolyn E. Wade
Supreme Court Justice

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[23] Plaintiff's reliance on *Executive Plaza, LLC v. Peerless Ins. Co.*, 22 NY3d 511 (2014), is unavailing because, unlike the case here, it involved "a condition precedent to the suit requiring complete replacement of the damaged property" (*Farage v Associated Ins. Mgt. Corp.*, 43 NY3d 152, 158 [2024]). The Court of Appeals' decision in *Farage*, which affirmed the First Judicial Department on November 26, 2024, further supports Defendant's original position that the replacement-value conditions precedent are irrelevant to the facts of this case.